Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

JUAN LUIS GARCIA, JR.,
And DARLENE GARCIA,

Petitioners,

v.

CRISTOBAL REYES and CITY OF FORT LAUDERDALE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER MINOR CHILDREN HAVE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN FAMILY COMPANIONSHIP UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT PROVIDES A CAUSE OF ACTION UNDER 42 U.S.C. § 1983 WHEN THE STATE UNLAWFULLY IMPRISONS THEIR FATHER FOR 30 MONTHS?

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PETITION FOR A WRIT OF CERTIORARI

Juan Luis Garcia and Darlene Garcia respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Florida entered on August 21, 1997 in *Garcia, Jr. v. Reyes*, 698 So. 2d 257 (Fla. 1997).

OPINIONS BELOW

A copy of the opinion of the Supreme Court of Florida in *Garcia, Jr. v. Reyes*, 698 So. 2d 257 (Fla. 1997), is included in the Appendix (App. 1). A copy of the opinion of the Fourth District Court of Appeal in *Garcia, Jr. v. Reyes*, 677 So. 2d 1293 (Fla. 4th Dist. Ct. App. 1996), is included in the Appendix (App. 8).

JURISDICTION

The decision of the Supreme Court of Florida was entered on August 21, 1997. This petition is timely filed pursuant to Sup. Ct. R.13.1. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1994).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

> of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE AND FACTS

In *Garcia, Jr. v. Reyes*, 698 So. 2d 257 (Fla. 1997). the Supreme Court of Florida addressed the following question, which had been certified to it by the Fourth District Court of Appeal for Florida as one of great public importance:

WHETHER THE CHILDREN HAVE A CONSTITUITONALLY PROTECTED LIBERTY INTEREST IN FAMILY COMPANIONSHIP UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT WOULD ALLOW A CAUSE OF ACTION UNDER 42 U.S.C. § 1983 WHEN THE STATE UNLAWFULLY IMPRISONS THEIR FATHER FOR 30 MONTHS?

The court of appeal had split in holding that there was no such cause of action where the State's interference with the right of familial association was not permanent. *Garcia, Jr. v. Reyes*, 677 So. 2d 1293 (Fla. 4th Dist. Ct. App. 1996). The Supreme Court of Florida affirmed, holding that there is no constitutionally protected liberty interest in family companionship under the Due Process Clause of the Fourteenth Amendment that would allow a cause of action under 42 U.S.C. section 1983 when the state unlawfully imprisons Plaintiffs' father for 30 months.

Petitioner Darlene Garcia was a six-year-old child and Petitioner Juan Luis Garcia, Jr. was a twelve-year-old

child at the time that their father, a professional jeweler, was wrongfully arrested, convicted, and incarcerated as a result of an unconstitutional reverse drug-sting operation conducted by Respondent Reyes, an officer of the Fort Lauderdale Police Department. (R. 71, 75). Bail pending appeal being prohibited by law, Garcia, Sr. spent 30 months in prison before his release following reversal of his conviction on due process grounds. *Garcia v. State*, 582 So. 2d 88 (Fla. 4th Dist. Ct. App. 1991).

After his release from prison, Juan Luis Garcia, Sr. filed suit for damages to redress his personal losses and for those sustained by his children as a result of the wrongful conviction and imprisonment of their father. (R. 70). Count III of the First Amended Complaint sought damages from Defendant Reyes under 42 U.S.C. § 1983 for his violation of the constitutionally protected liberty interest in family companionship and association of Garcia, Sr. and his children. Count III alleged that Officer Reyes was liable to plaintiffs for his unlawful conduct in the wrongful arrest and conviction of Juan Luis Garcia, Sr., i.e., that acting under color of state law, he deprived father and children of their liberty interest, as guaranteed by the Due Process Clause of the Fourteenth Amendment, to be free from unjustified police injury to the family unit. (R. 75-76).

More particularly, Count III, ¶¶ 26-37, alleged that petitioners were deprived of the care, custody and companionship of their father during the period of his unconstitutional imprisonment and suffered loss of financial support because the incarceration terminated his employment and cut off his ability to support them. It further alleged that Darlene became deeply depressed and suicidal.

The trial court dismissed Count III with prejudice, and on direct appeal, the Florida Fourth District Court of Appeal affirmed. *Garcia, Jr. v. Reyes*, 677 So. 2d 1293 (Fla. 4th Dist. Ct. App. 1996). It held that § 1983 did not provide a cause of action where the disruption of the family unit was not permanent, as in the case of a death. One judge dissented. *Id.* at 1295. Petitioners timely invoked the discretionary jurisdiction of the Supreme Court of Florida, and it affirmed the court of appeal. *Garcia, Jr. v. Reyes*, 698 So. 2d 257 (Fla. 1997).

SUMMARY OF THE ARGUMENT

Four federal circuits have concluded that the right of parents and children to associate together as a family is violated and actionable by the parent under § 1983 when a state actor unlawfully kills a child. Two circuits, one in dictum and one in holding, maintain that the child has the same right to sue for the death of a parent. Other circuits have rejected the right of family association in similar factual contexts. The Supreme Court of Florida aligned itself with what it deemed to be the majority view and rejected the claim of a constitutionally protected liberty interest under the Due Process Clause.

No case has confronted the precise question posed here: whether police misconduct that deprives a child of his parent in a serious, substantial but nonfatal manner is actionable under § 1983 where the deprivation has the potential for life-long harm. In this respect, the Supreme Court of Florida held in the alternative that death is a requirement of any right of action that might exist. But

the circuits that have recognized a cause of action have not held that death is an essential element, although it was a fact in those cases. In this sense, death was a descriptive rather than prescriptive fact.

The question presented is one of great public importance that has not been but should be settled by this Court. This Court and the lower federal courts have developed over seven decades a body of case law that emphasizes the central role of the family in civil society. These cases recognize the right of familial association and deem it fundamental because it is so rooted in the traditions and collective consciousness of our people that it lies at the base of our civil and political institutions. As such, it is part of substantive due process under the Fourteenth Amendment.

Here a state actor, in adjudicated violation of law, inflicted substantial and potentially enduring damage upon the family. Respondent deprived petitioners of their father's nurturance and financial support during their formative years, a deprivation that may well prove to be a life-long injury. Because of the family's special place in civil society, the State's violation of the liberty interest of a parent and children to associate with each other should be actionable under § 1983 in these circumstances.

REASONS FOR GRANTING THE WRIT

This case concerns the proper interpretation of 42 U.S.C. § 1983, the sole ground of decision in the court below; there is no independent state ground of decision. The decision of the Supreme Court of Florida on a matter

of federal law conflicts with those circuits that have recognized a cause of action under § 1983. The Supreme Court of Florida aligned itself with what it deemed to be the "majority of the federal courts of appeal which have . . . refuse[d] to recognize a claim by a family member under section 1983 for the death or injury of another allegedly caused by state action." 698 So. 2d at 259. Further, the court read the statutory purpose of § 1983 in a way that directly conflicts with that of *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

A conflict between a decision of a state court and a federal court of appeals on a federal question is ground for granting review. *MacGregor v. Westinghouse Co.*, 329 U.S. 402 (1947). Even without conflict, state court decisions involving the construction and application of federal statutes may be reviewed on certiorari where the question is sufficiently important. *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961).

This case presents "a question of importance not heretofore considered by this Court, and one over which the Circuits are divided." *Lehman v. Lycoming County Children's Serv.*, 458 U.S. 502, 507 (1982). Not only is there conflict between the Supreme Court of Florida and several federal circuits, but the question is one of great public importance. It requires explication of the scope of the right of familial association, particularly, the extent of congressional purpose underlying 42 U.S.C. § 1983 to protect children whose parents are victimized by unlawful state action.

I. Certiorari Should Be Granted To Resolve The Conflict That Exists Between The Supreme Court Of Florida And Several Federal Circuits Whether Minor Children Have A Constitutionally Protected Liberty Interest In Family Companionship Under The Due Process Clause Of The Fourteenth Amendment That Provides A Cause Of Action Under § 1983 When The State Unlawfully Imprisons Their Father For 30 Months.

The most comprehensive and carefully considered treatment of liability under § 1983 for injury to the right of familial association occurs in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984). In *Bell*, a father's estate brought an action under 42 U.S.C. § 1983 for the racially motivated fatal shooting of the father's son. The trial court ruled that the Wisconsin Wrongful Death Statute, which limited the amount recoverable by a parent of a decedent, did not apply to the estate's § 1983 claim, and the City appealed. In order to decide this question, it was necessary for the court to determine whether the father had a constitutionally protected liberty interest in the continued society and companionship of his son. The court examined "the parameters of the constitutional protection afforded the parent-child relationship" in Supreme Court decisions and concluded that "Daniel Bell's father possessed a constitutional liberty interest in his relationship with his son." *Id.* at 1243. The lost society and companionship suffered was remediable by damages awarded under § 1983.

Petitioners' claim finds direct support in the *Bell* court's examination of the legislative history of § 1983, finding an **even stronger** reciprocal right of recovery in the children:

> the legislative history makes a clearer case for the recovery to the child due to loss of support or loss of society and companionship of a parent, recognition of the child's rights vis-a-vis parental loss logically implies the reciprocal recognition of the parent's rights vis-á-vis the loss of a child.

Id. at 1244. The court saw in the Civil War origins of the statute a particular purpose to protect the families of the "direct" victims of Klan-type persecution. In direct conflict on this point, the Supreme Court of Florida concluded that "the text of section 1983 itself suggests that the statute was designed to protect the persons whose constitutional rights have been violated rather than someone who may have been indirectly affected by state action." 698 So. 2d at 259.

Also supporting petitioners' claim is *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir. 1987) (holding that the constitutional interest in familial companionship extends to protect children from unwarranted state interference with paternal relationship where the father died as a result of being unlawfully shot by police); *Estate of Bailey v. County of York*, 768 F.2d 503, 509 n.7 (3d Cir. 1985), *rev'd on other grounds, Deshaney v. Winnebago County Dep't of Social Serv.*, 489 U.S. 189 (1989) (following the Seventh Circuit's decision, recognizing a parent's "liberty interest in the custody of his children and the maintenance and integrity of the family"); *Mattis v. Schnarr*, 502 F.2d 588, 594 (8th Cir. 1974) (holding that the relationship between parent and child is "fundamental to our civilization"); *see also Trujillo v. Bd. Of County Comm'rs*, 708 F.2d 1186, 1190 (10th Cir. 1985) (allowing a cause of action under § 1983

for relatives where it is alleged that the state intended to interfere with their right to familial relationship).

However, other circuits have refused to recognize a claim under § 1983 for loss of family association where the state action was not aimed at the person seeking the redress. *See Shaw v. Stroud*, 13 F.2d 791, 805 (4th Cir. 1994) (affirming denial of § 1983 claim brought by wife and minor children of individual shot and killed by state trooper); *Harpole v. Arkansas Dep't of Human Serv.*, 820 F.2d 923, 927-28 (8th Cir. 1987) (affirming dismissal of § 1983 brought by grandmother of child who died from the state's alleged negligence); *Coon v. Ledbetter*, 780 F.2d 1158, 1160-61 (5th Cir. 1986) (affirming denial of § 1983 claim brought by wife and daughter of man shot inside his trailer home by deputies); *Ortiz v. Burgos*, 807 F.2d 6 (1st Cir. 1986) (affirming denial of § 1983 claim brought by stepfather and siblings of individual beaten to death by prison guards).

The latter case was central to the holding and rationale of the decision by the Supreme Court of Florida. Indeed, it quoted the *Burgos* opinion at length, 698 So. 2d at 259, for the proposition that even an "egregious" killing by prison guards was not actionable under § 1983. The conflict between *Bell* and *Burgos*, with the Supreme Court of Florida siding with *Burgos*, could not be clearer.

II. The Supreme Court Of Florida Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

Granting certiorari turns on the importance of the issue "to the public as distinguished from" its importance to the particular parties involved. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). The evolution of the fundamental right to associate together as a family in this Court spans seven decades. The seminal case is *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), defining the "liberty" protected by the Due Process Clause of the Fourteenth Amendment in expansive terms:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, **to marry, establish a home and bring up children**, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 398-89 [e.s]. Thereafter, this Court frequently emphasized the primacy of family life and the parent-child relationship. It termed child custody "rights far more precious . . . than property rights." *May v. Anderson*, 345 U.S. 528, 533 (1953). "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state

can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Because of the fundamental importance of the family in civil society, the state may not separate a parent and child even temporarily without according them procedural due process of law to protect their liberty interest in the integrity of the family unit. *Lassister v. Dep't of Social Serv.*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The teaching of this Court's constitutionally-based family law jurisprudence is that the right of family association is protected, both substantively and procedurally, from unwarranted state interference by the Due Process Clause of the Fourteenth Amendment. Again in a more recent case this Court reaffirmed that "choices about marriage, family life, and upbringing of children are among associational rights ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard or disrespect." *M.L.B. v. S.L.J.*, ___ U.S. ___, 117 S.Ct. 555, 564 (1996).

The authorities are in substantial disarray on an important question of federal law. The lower state and federal courts, the Garcia children, other families and society in general will benefit from a resolution of the scope of any protection that may be afforded by § 1983 under these and similar circumstances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Juan Luis GARCIA, Jr., et al., Petitioners,

v.

Cristobal REYES, et al., Respondents.

No. 89018.

Supreme Court of Florida.

Aug. 21, 1997.

After he was arrested and later convicted of drug charges and held for period of 30 months before his conviction was reversed based on entrapment, father brought federal civil rights action against city and police officer, alleging that detention deprived both him and his children of their constitutionally protected right to familial association. The Seventeenth Judicial Circuit Court, Broward County, Mel Grossman, J., dismissed action for failure to state a claim. Father appealed. The District Court of Appeal, 677 So.2d 1293, affirmed, and question was certified. The Supreme Court, Grimes, J., held that children did not have constitutionally protected liberty interest in family companionship under due process clause that would allow § 1983 action when state unlawfully imprisoned their father for 30 months.

Question answered.

Steven Wisotsky, Miami, for Petitioners.

Raoul G. Cantero, III and Jonathan Colan of Adorno & Zeder, P.A., Miami, for Respondents.

Andrew Kayton, Miami; and Professor Steven G. Gey, Florida State University, College of Law, Tallahassee, for The American Civil Liberties Union Foundation of Florida, Amicus Curiae.

John J. Copelan, Jr., County Attorney for Broward County; Anthony C. Musto, Chief Appellate Counsel and Tamara M. Scrudders, Assistant County Attorney, Fort Lauderdale, for Broward County, Amicus Curiae.

GRIMES, Judge.

We review *Garcia v. Reyes*, 677 So.2d 1293 (Fla. 4th DCA 1996), in which the court certified the following question as one of great public importance:

> WHETHER THE CHILDREN HAVE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN FAMILY COMPANIONSHIP UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT WOULD ALLOW A CAUSE OF ACTION UNDER 42 U.S.C. SEC.1983 WHEN THE STATE UNLAWFULLY IMPRISONS THEIR FATHER FOR 30 MONTHS?

Id. at 1295. We have jurisdiction under article V, section 3(b)(4) of the Florida Constitution.

Juan Garcia, Sr., was arrested as a result of a reverse drug sting operation conducted by Cristobal Reyes, an officer of the Fort Lauderdale Police Department. Garcia was subsequently convicted of attempted armed trafficking in cocaine and conspiracy to traffic in cocaine. On appeal, his convictions were reversed on grounds of entrapment. *Garcia v. State*, 582 So.2d 88 (Fla. 4th DCA 1991). *See Londono v. State*, 565 So.2d 1365 (Fla. 4th DCA 1990) (opinion on codefendant's appeal which sets forth relevant facts of the criminal case). Garcia was imprisoned for approximately thirty months from the time he was arrested until his convictions were reversed.

Thereafter, Garcia, individually and on behalf of his two minor children, filed a civil action against Reyes and the City of Fort Lauderdale, seeking compensation for losses suffered as a result of his wrongful conviction and incarceration. The trial court dismissed count III of the amended complaint, which was the only count in which claims were pled on behalf of the children. Count III asserted a cause of action under 42 U.S.C. § 1983 (1994) for loss of child support, loss of family companionship, emotional and mental suffering, and loss of family unity and association between Garcia and his children.

On appeal from the trial court's dismissal of the children's claims, the district court of appeal affirmed but certified the foregoing question. In its opinion, the court made the following observation:

> The trial court correctly recognized that no Florida court, nor the federal Eleventh Circuit or the United States Supreme Court, has recognized a cause of action under 42 U.S.C. § 1983 based on state interference with the right of familial association. Other federal circuits have been divided on this issue, but none of the other circuits that have recognized such a cause of action have done so in a situation such as the one at bar where the right to familial association has been only temporarily rather than permanently taken away.

Garcia, 677 So.2d at 1293-94 (footnote omitted).

Garcia claims that the children have a cause of action under 42 U.S.C. § 1983 because the right of family association is protected from state interference by the Due Process Clause of the Fourteenth Amendment. He points

to several federal circuit court decisions which have held that the right to family association is constitutionally protected and thereby actionable by the parent under section 1983 when a state actor unlawfully kills a child. *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir.1987); *Estate of Bailey v. York County*, 768 F.2d 503 (3d Cir.1985); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir.1984). However, a majority of the federal courts of appeal which have considered the issue refuse to recognize a claim by a family member under section 1983 for the death or injury of another allegedly caused by state action. *Shaw v. Stroud*, 13 F.3d 791, 805 (4th Cir.1994) (affirming denial of section 1983 claim brought by wife and minor children of individual shot and killed by state trooper); *Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 927-28 (8th Cir.1987) (affirming dismissal of section 1983 claim brought by grandmother of child who died, allegedly due to state's negligence); *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 6 (1st Cir.1986) (affirming denial of section 1983 claim brought by stepfather and siblings of individual beaten to death by prison guards); *Coon v. Ledbetter*, 780 F.2d 1158, 1160-61 (5th Cir.1986) (affirming denial of section 1983 claim brought by wife and daughter of man shot inside his trailer home by deputies).

The United States Supreme Court has held as a matter of substantive due process that the government may not interfere in certain particularly private family decisions. *E.g., Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). That Court has also held that when the state seeks to change or affect the relationship of parent and child in furtherance of a legitimate state interest, a Fourteenth Amendment liberty interest is

implicated and the state should adhere to rigorous procedural safeguards. *E.g., Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (involving termination of parental rights); *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (determining custody rights of unwed father). However, the United States Supreme Court has never suggested or even implied that a right for deprivation of family association is actionable under section 1983.

In addition, the text of section 1983 itself suggests that the statute was designed to protect the person whose constitutional rights have been violated rather than someone who may have been indirectly affected by state action. Thus, section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

In rejecting a section 1983 claim by relatives of a person who was beaten to death by prison guards, the First Circuit Court of Appeals in *Valdivieso Ortiz,* 807 F.2d at 9, observed:

> Although we recognize and deplore the egregious nature of the alleged government action in this case, we hesitate, in the rather novel context of this case, to erect a new substantive right upon the rare and relatively

> uncharted terrain of substantive due process when case law, logic and equity do not command us to do so. It does not necessarily follow that the incidental deprivation of even a natural parent's parental rights is actionable simply because the relevant deprivation of life is shocking. In addition, a conclusion that governmentally caused termination of, or encroachment on, the parental interest in the continued relationship with a child always is actionable would constitutionalize adjudication in a myriad of situations we think inappropriate for due process scrutiny, including the alleged wrongful prosecution and incarceration of a child or the alleged wrongful discharge of a child from a state job, forcing the child to seek employment in another part of the country. Moreover, the problem of giving definition and limits to a liberty interest in this vast area seems not only exceedingly difficult but to a considerable extent duplicative of the widespread existence of state causes of action, as in this case, which provide some compensation to grieving relatives.

We are reluctant to recognize a section 1983 cause of action for deprivation of family association under circumstances where no court in the nation has ever done so. In each instance where a section 1983 action brought by relatives of the victim has been approved, the cause of action arose out of a death caused by a governmental actor, and in a real sense those claimants were standing in the shoes of the victim. *See Willard v. City of Myrtle Beach*, 728 F.Supp. 397, 404 (D.S.C.1989) ("[E]very court which has recognized such a right of action has only done so

within the factual context of a permanent, physical separation of parent and child, such as allegations of unlawful killing by individual state actors.").

We therefore answer the certified question in the negative and approve the decision below.[1]

It is so ordered.

KOGAN, C.J., and OVERTON, SHAW, HARDING, WELLS and ANSTEAD, JJ., concur.

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[1] In view of our decision, we do not address the respondents' additional argument that entrapment does not violate federal due process rights so as to allow a section 1983 claim.

Juan Luis GARCIA Senior, on his own behalf, Juan Luis Garcia Jr., and Darlene Garcia, minors, by their father and next friend, Appellants,

v.

Cristobal REYES, and The City of Fort Lauderdale, Appellees.

No. 94-2627.

District Court of Appeal of Florida, Fourth District.

June 19, 1996.

Order Certifying Question Aug. 20, 1996.

After he was arrested and later convicted of drug charges and held for period of 30 months before his conviction was reversed based on entrapment, 582 So.2d 88, father brought federal civil rights action against city and police officer alleging that detention deprived both him and his children of their constitutionally protected right to familial association. Defendants moved to dismiss for failure to state claim, and the Seventeenth Judicial Circuit Court, Broward County, Mel Grossman, J., granted motion. Father appealed, and the District Court of Appeal, Polen, J., held that claim based on interference with familial rights which was temporary and not permanent was insufficient to state claim under federal civil rights statute.

Affirmed.

Pariente, J., dissented and filed opinion.

Steven Wisotsky, Miami, for appellants.

Stephanie Curd and Robert H. Schwartz of Gunther & Whitaker, P.A., Fort Lauderdale, for appellees.

POLEN, Judge.

Juan Luis Garcia Sr., on his own behalf and on behalf of his two minor children, appeals from a final order dismissing with prejudice count III of the plaintiff's first amended complaint. We affirm.

Juan Luis Garcia, Sr. was arrested for trafficking in cocaine and conspiracy to traffic in cocaine. He was subsequently convicted of the conspiracy. However, this conviction was overturned pursuant to a decision of this court that Garcia was entrapped.[1] Garcia on his own behalf and on the behalf of his two minor children then filed suit against Officer Cristobal Reyes and the City of Fort Lauderdale, alleging among other counts, that the city violated their due process rights in their association as a family unit. This count essentially alleged that while in prison, Garcia was deprived of the care, custody and companionship of his children and his children were deprived of a reciprocal right. Reyes and the City filed a motion to dismiss for failure to state a cause of action. This motion was granted as to count III only (the count that alleged violation of the due process right of familial association & companionship).

We affirm the trial court's dismissal of this count. The trial court correctly recognized that no Florida court, nor the federal Eleventh Circuit or the United States Supreme Court, has recognized a cause of action under 42 U.S.C.

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[1] *Garcia v. State*, 582 So.2d 88 (Fla. 4th DCA 1991).

§ 1983[2] based on state interference with the right of familial association. Other federal circuits have been divided on this issue, but none of the other circuits that have recognized such a cause of action have done so in a situation such as the one at bar where the right to familial association has been only temporarily rather than permanently taken away. *See Smith v. City of Fontana,* 818 F.2d 1411 (9th Cir.1987) (holding that the constitutional interest in familial companionship extends to protect children from unwarranted state interference with their relationships with their parents when father who was unarmed and offered only instinctive resistance to blows administered by police officers died as a result of being shot by police). *See also Willard v. City of Myrtle Beach,* 728 F.Supp. 397 (D.S.C.1989), in which the court stated as follows:

> Alternatively, assuming that a constitutionally protectible parental liberty interest in the continued companionship and association with their children exists within the rubric of substantive due process, it is nevertheless clear that no such liberty interest is implicated by plaintiffs' allegation that their son has suffered permanent emotional and psychological harm by virtue of a brief four hour detention by defendants on June 11, 1986. Significantly, as previously stated, every court which has recognized

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[2] 42 U.S.C. § 1983 provides: Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws as, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> such a right of action has only done so within the factual context of a permanent, physical separation of parent and child, such as allegations of unlawful killing by individual state actors. (Emphasis added.)

While we recognize at bar that Garcia's thirty month detainment might have been a hardship on his children, and practically speaking his children might have suffered as a result of his incarceration, there is no Florida authority allowing the children to recover for the temporary detainment of their parent. However, we do recognize that there are other causes of actions that can be pursued by Garcia as evidenced by the still viable counts of his complaint where these claims might at least be taken into consideration. We nonetheless affirm the trial court's decision not to recognize a new cause of action based on such a loss.

WARNER, J., concurs.

PARIENTE, J., dissents with opinion.

PARIENTE, Judge, dissenting.

This is a final appealable order only as to the claims of Juan Luis Garcia, Sr., on behalf of his minor children, and not as to those brought by him individually because several of his related claims are still pending. *See Biasetti v. Palm Beach Blood Bank, Inc.*, 654 So.2d 237 (Fla. 4th DCA 1995). The dismissal of the children's claim for deprivation of familial association is appealable because there are no other pending counts for which they could recover damages.

The complaint alleges that Juan Luis Garcia, Sr. was wrongfully imprisoned for thirty months. At the time of

his arrest, his daughter, Darlene Garcia, was six years old and his son, Juan Luis Garcia, Jr., was twelve years old. The complaint alleges that as a result of her father's absence, Darlene sustained severe mental trauma requiring psychiatric therapy. It is further alleged that both Darlene and Juan suffered the loss of their father's care and companionship together with the loss of financial support in the form of child support.

The seminal question presented is whether there is a constitutionally-protected liberty interest in family companionship and association under the due process clause of the United States Constitution, which would allow the children to bring a civil rights action under 42 U.S.C. § 1983 for unlawful state interference with that right. There is no Florida case law or eleventh circuit decision on the subject, either recognizing or rejecting this cause of action. In my opinion, expansion of the law to allow a claim to be filed on behalf of the children for a substantial constitutional deprivation directly occasioned by the alleged misconduct of the state is consonant with the purpose of § 1983 actions.

In *Smith v. City of Fontana,* 818 F.2d 1411, 1418 (9th Cir.1987), *cert. denied,* 484 U.S. 935, 108 S.Ct. 311, 98 L.Ed.2d 269 (1987), the Ninth Circuit explained its reasoning for recognizing an independent civil rights claim of a child:

> We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a

> tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 619-20, 104 S.Ct. 3244, 3250, 82 L.Ed.2d 462 (1984) ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.").

(Footnote omitted). *Accord Bell v. City of Milwaukee*, 746 F.2d 1205, 1242-48 (7th Cir.1984); *see also Estate of Bailey v. County of York*, 768 F.2d 503, 509 n. 7 (3d Cir.1985), *overruled on other grounds, DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *Logan v. Hollier*, 711 F.2d 690, 690-91 (5th Cir.1983), *cert. denied*, 466 U.S. 936, 104 S.Ct. 1909, 80 L.Ed.2d 458 (1984); *Greene v. City of New York*, 675 F.Supp. 110 (S.D.N.Y.1987). *But see Berry v. Muskogee*, 900 F.2d 1489 (10th Cir.1990); *Broadnax v. Webb*, 892 F.Supp. 188 (E.D.Mich.1995).

This case is distinguishable from the de minimis separation in *Willard v. City of Myrtle Beach*, 728 F.Supp. 397 (D.S.C.1989), which involved a four hour detention and was decided at the summary judgment phase. In Willard, based solely on their child's four-hour detention by the police, the parents brought a civil rights action alleging a deprivation of their constitutional right to the continued companionship of their son.

While the nearly three-year separation in this case was not a permanent separation as in cases of death, the

effects of the separation during the children's formative years may very well be permanent. Allowing the children's constitutional claim in this case to withstand a motion to dismiss does not trivialize the constitutional right to familial association.

The complaint alleges a substantial loss over a long period of time. Because we are reviewing this case on a motion to dismiss, we must accept the allegations of the complaint as true. I cannot say as a matter of law that no substantial deprivation of the children's constitutional rights occurred as a result of the allegedly wrongful incarceration of their father. Although plaintiff Juan Garcia, Sr. has other cognizable causes of action available to him individually, there is no other relief available to the children. I, therefore, would reverse and find that this complaint states a cause of action.

BY ORDER OF THE COURT:

ORDERED that appellants' suggestion of question of great public importance filed June 26, 1996, is granted, and the following question is hereby certified:

> WHETHER THE CHILDREN HAVE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN FAMILY COMPANIONSHIP UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT WOULD ALLOW A CLAUSE OF ACTION UNDER 42 U.S.C. SEC. 1983 WHEN THE STATE UNLAWFULLY IMPRISONS THEIR FATHER FOR 30 MONTHS?